# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 13, 2008 |
| v | No. 276455<br>Macomb Circuit Court |
| HUGO MORAN-DOPICO,<br><br>Defendant-Appellant. | LC No. 2005-004732-FC |

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to possess with intent to deliver 1,000 or more grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(*i*). Defendant was sentenced to consecutive prison terms of 12 to 30 years for the possession conviction and 13 to 30 years for the conspiracy conviction. We affirm.

## I. Basic Facts

Defendant's convictions arise from his participation with codefendants Jesus Ramon Cottleon,[1] Rigoberto Cardenas-Borbon, Antonio Perez-Chica, and others in trafficking cocaine from Phoenix, Arizona, to the Detroit area. As a result of anonymous information received, the Oakland-Macomb Interdiction Team set up surveillance at a Red Roof Inn in Roseville on April 26, 2005. In the hotel parking lot was a black Ford Explorer with an Arizona license plate. The police discovered that the Explorer was not registered to Jose Martinez, who had paid for the hotel room. During the surveillance, Detective-Sergeant Terence Mekoski observed Perez-Chica coming in and out of the room and pacing near the Explorer. Shortly thereafter, Cottleon arrived, greeted Perez-Chica and Martinez, and the men went into the room. Minutes later, Cottleon and Perez-Chica came out of room and Perez-Chica handed a set of keys to Cottleon, who got in the Explorer and quickly drove it out of the lot. Shortly thereafter, Mekoski stopped the vehicle for traffic infractions, a drug-sniffing canine alerted the police to the presence of

[1] Cottleon was known by several aliases, including "Candelario Herrera."

drugs, and ten kilograms of cocaine were found in a hidden compartment. Cottleon was arrested at the scene, and Perez-Chica and Martinez were arrested at the hotel.

Cottleon agreed to cooperate with the investigation and informed the police of a conspiracy involving men from Mexico delivering and selling cocaine through defendant, an Arizona resident with connections in the Detroit area. Cottleon testified that in March 2005, Jamie Cardenas-Borbon, a Mexican immigrant and codefendant Rigoberto Cardenas-Borbon's relative, needed clients to sell cocaine. Cottleon met defendant in his Arizona apartment in March or April 2005, and defendant advised Cottleon that he could traffic a large quantity of cocaine through his Detroit connections. Cottleon and defendant later met with Jamie, and defendant confirmed that he could distribute the cocaine.

On April 20, 2005, Cottleon and defendant flew to Detroit to verify defendant's customer base.[2] Defendant's friend picked up the two men from the airport and took them to a restaurant where they met defendant's associates. The next morning, a deal was arranged between Jamie, via Rigoberto's phone, defendant, and defendant's associates involving ten kilograms of cocaine at a rate of $18,500 a kilogram to arrive within a few days. Defendant remained in Detroit and Cottleon returned to Arizona on April 21, 2005. On April 24, 2005, Cottleon and Rigoberto left Arizona en route to Michigan in a white Durango with a Mexico license plate. Cottleon and Rigoberto were following Perez-Chica and Martinez in the Explorer that contained the cocaine. Cottleon explained that Rigoberto used a cell phone to assure that there were no problems with the Explorer's travels. On the morning of April 26, 2005, the Durango was stopped in St. Louis for a traffic violation, searched, and released. At the time, the Durango was "about an hour" behind the Explorer. After arriving in Detroit, Cottleon and Rigoberto met defendant and his associates at a gas station. Subsequently, one of defendant's associates drove Rigoberto and Cottleon to the Red Roof Inn, where Cottleon took control of the Explorer. Defendant remained at the gas station waiting for Cottleon to return with the cocaine. Cottleon indicated that when he was arrested, he was en route to meet defendant at the gas station and they were going to deliver the cocaine to defendant's associate's house.

A DEA agent testified that as a result of information provided by Cottleon, the police requested assistance in locating the Durango, because it was likely traveling the same route to return to Arizona. On April 28, 2005, the St. Louis police stopped the Durango. Rigoberto was driving and defendant was a passenger. Both men were arrested.

## II. Right to Cross-Examination

Defendant argues that his constitutional right to confront witnesses was violated when the trial court limited defense counsel's cross-examination of Cottleon regarding his motives for cooperating in this case. We disagree. We review de novo constitutional questions regarding a defendant's right of confrontation. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581

[2] Jamie gave Cottleon $1,500 to purchase the plane tickets. Airline ticket information confirmed that the two men flew together from Arizona to Detroit.

(2000). "A trial court's limitation of cross-examination is reviewed for an abuse of discretion." *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002) (citation omitted).

Cottleon's trial testimony was the principal evidence implicating defendant in the conspiracy. Before taking the stand, the court advised Cottleon of his right not to testify and placed on the record his plea agreement with the prosecution, which included a recommendation of a minimum sentence of seven years. Cottleon acknowledged that no other promises had been made in exchange for his testimony against defendants, and Cottleon's attorney acknowledged that the agreement as stated was accurate. Codefendant Rigoberto Cardenas-Borbon's attorney queried Cottleon regarding his understanding of his plea agreement. Cottleon initially indicated an understanding that he might still be eligible to receive probation if he continued to cooperate. The trial court then interposed and stated it would not give Cottleon probation. When questioned whether he understood that the court would not give him a sentence "less than seven years," Cottleon acknowledged that he understood that imprisonment for a period of seven years to be the minimum sentence he would receive. At this juncture, the trial court stated on the record:

> The Court is making a ruling right now as far as this case is concerned that for this gentlemen's testimony he is going to get a minimum on the maximum, minimum of seven years. End of story.

The following exchange then occurred between codefendant Cardenas-Borbon's attorney and the trial court:

> [*Cardenas-Borbon's attorney*]: I want to be able to question him as to his state of mind at the time he agreed to cooperate because he agreed to cooperate more than a year ago, and if more than a year ago he says, well, I'm going to agree to cooperate because I think I can get probation, and that turns out to be different later, it's still the motivation that provided the impetus for the cooperation.
>
> [*The trial court*]: Now we are getting into speculation.
>
> * * *
>
> It's been over a year since the exam was held, this is November 30th, nothing has happened, and I'm saying on the record right now that from this court on this case, he will get no less than seven years.
>
> [*Cardenas-Borbon's attorney*]: Right, your Honor, but we are talking about motive, motive for the testimony.
>
> [*The trial court*]: No, it could have been a motive then but it is no longer a motive since he clearly understands that this Court is going to give him seven years. I'm not going to allow it.

A defendant's constitutional right to confront his accusers is secured by the right of cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "A witness may be cross-

examined on any matter relevant to any issue in the case," *People v Federico*, 146 Mich App 776, 793; 381 NW2d 819 (1985), but neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra* at 138. Rather, a court has wide latitude to impose reasonable limits on cross-examination based on concerns such as prejudice, confusion of the issues, or questioning that is irrelevant or only marginally relevant.[3] *Id*.; *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

The trial court did not abuse its discretion by limiting the cross-examination of Cottleon to the scope of the sentencing agreement under which he testified. Cottleon clearly stated that he understood that he would receive a minimum sentence of seven years in exchange for his testimony, and that he did not expect any further reduction or sentencing consideration. The jury was plainly aware of Cottleon's motive for testifying. Evidence that a year earlier, Cottleon may have thought that he *possibly* could get probation for his cooperation was tenuous and immaterial at this later juncture. Therefore, we are not persuaded that the trial court abused its discretion by limiting cross-examination.

## III. Sufficiency of the Evidence

Defendant next argues that the evidence was insufficient to sustain his convictions. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

### A. Conspiracy to Deliver 1,000 or More Grams of Cocaine

Under MCL 333.7401(2)(a)(*i*), it is unlawful for a person to deliver 1,000 or more grams of cocaine. A "person who conspires together with 1 or more persons to commit an offense prohibited by law . . . is guilty of the crime of conspiracy[.]" MCL 750.157a; *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). Conspiracy is a specific intent crime, requiring "the intent to combine with others and the intent to accomplish an illegal objective." *Id.* To prove the intent to combine with others, it must be shown that the intent, including knowledge, was possessed by more than one person. *People v Blume*, 443 Mich 476, 482, 485; 505 NW2d 843 (1993). For intent to exist, the defendant "must know of the conspiracy, must know of the objective of the conspiracy, and intend to participate cooperatively to further that objective." *Id.* Direct proof of a conspiracy is not essential. Rather, a conspiracy may be proven by circumstantial evidence or by reasonable inference, and no formal agreement is required. *People*

[3] Evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

*v Justice* (*After Remand*), 454 Mich 334, 347-348; 562 NW2d 652 (1997); *People v Cotton*, 191 Mich App 377, 393; 478 NW2d 681 (1991).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant conspired with others to deliver 1,000 or more grams of cocaine. Defendant and the charged coconspirators came to Michigan from Arizona. While in Arizona, through Cottleon, defendant met with Jamie Cardenas-Borbon, a Mexican immigrant who was seeking clients to traffic a large quantity of cocaine, and defendant assured him that he could distribute the cocaine in the Detroit area. At Jamie's expense, defendant and Cottleon flew from Arizona to Detroit together and met with defendant's associates to verify defendant's ability to traffic the cocaine. Airline information corroborated the testimony that defendant and Cottleon traveled from Arizona to Detroit. In Detroit, the men arranged a deal for the delivery of ten kilograms of cocaine to be delivered within a few days. Defendant remained in Detroit, while Cottleon returned to Arizona. Soon thereafter, the Explorer containing the cocaine left Arizona. Cottleon and Rigoberto were about an hour behind the Explorer in a Durango. Once in Detroit, Cottleon and Rigoberto met defendant and his associates. Defendant's associate drove Rigoberto and Cottleon to the hotel, where Cottleon took control of the Explorer in order to deliver the cocaine to defendant, and then to defendant's associates. When Cottleon was arrested, he was en route to meet defendant. Two days after the police seized the cocaine in the Explorer, the Durango was stopped heading toward Arizona. Defendant was in the vehicle with Rigoberto. Defendant's cell phone was seized, and records showed 14 phone calls between his phone and Cottleon's phone.

This evidence established a basis for the jury to conclude that defendant conspired with others to deliver the cocaine found in the Explorer. Defendant's and his associates' interaction and concordant behavior was evidence of concert of action, which created an inference of conspiracy. See *Justice* (*After Remand*), *supra* at 347, and *Cotton, supra* at 393-394. The jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The evidence was sufficient to sustain defendant's conviction of conspiracy to deliver 1,000 or more grams of cocaine.

B. Possession with Intent to Deliver 1,000 or More Grams of Cocaine

Defendant only asserts that there was insufficient evidence that he possessed the cocaine, arguing that there was no evidence that he knew about a cocaine transaction.[4] Possession of a controlled substance may be either actual or constructive, and may be joint as well as exclusive. *Wolfe, supra* at 519-520. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 520. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271; 536 NW2d 517 (1995).

[4] The elements of possession with intent to deliver 1,000 or more grams of cocaine are (1) the recovered substance was cocaine, (2) the cocaine was in a mixture weighing more than 1,000 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the cocaine with the intent to deliver it. MCL 333.7401(2)(a)(*i*); *Wolfe, supra* at 516-517.

"[C]ircumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish possession." *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

At trial, the prosecutor advanced the theory that defendant was guilty as a principal or an aider and abettor. A person who aids or abets the commission of a crime may be convicted and punished as if he directly committed the offense. MCL 767.39. "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001) (citation omitted).

"'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support, encourage, or incite the commission of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Rockwell*, 188 Mich App 405, 411-412; 470 NW2d 673 (1991). "The quantum of aid or advice is immaterial as long as it had the effect of inducing the crime." *People v Lawton*, 196 Mich App 341, 352; 492 NW2d 810 (1992). An aider and abettor's state of mind may be inferred from all the facts and circumstances, including a close association between the defendant and the principal, and the defendant's participation in the planning or execution of the crime. *Carines, supra* at 758.

Viewed in a light most favorable to the prosecution, the same evidence that enabled the jury to conclude that defendant conspired with others to possess and deliver the cocaine also established a basis for the jury to conclude beyond a reasonable doubt that defendant possessed the cocaine. A jury could reasonably infer from defendant's actions and associations that he constructively possessed the cocaine or assisted others in possessing the cocaine found in the Explorer. There was sufficient evidence linking defendant to the cocaine found in the Explorer to sustain his conviction of possession with intent to deliver 1,000 grams of cocaine.

## IV. Defendant's Supplemental Brief

Defendant raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

### A. Complaint

Defendant argues that that the trial court lacked jurisdiction because the complaint did not include a factual basis to establish probable cause, a victim, an affidavit, or supplemental sworn testimony. Because defendant failed to raise this issue below, we review this claim for plain error affecting substantial rights. *Carines, supra* at 763-764. The complaint contained the substance of the accusations against defendant and the name and statutory citation for the charged offenses, which is all that is required. MCL 764.1d; MCR 6.101(A). Consequently, there was no plain error.

### B. Obstruction of Justice by the Trial Court

Defendant argues that the trial court obstructed justice and impeded his right to prove his innocence by failing to adjudicate his motions, which were crucial to proving his innocence. Because defendant failed to raise this claim below, we review it for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

Although defendant makes several accusations against the trial court, most are based on his claim that the trial court failed to review any of his motions and instead treated "each motion as moot, before ever reviewing the motion on the merits and evidence." Defendant does not identify or discuss any specific motion, but has merely submitted a docket printout from the lower court. The record discloses that defendant filed five motions: (1) Motion for Severance; (2) Motion for Discovery of all aliases and criminal convictions for Cottleon; (3) Motion to Dismiss based on violation of due process (arrest); (4) Motion to Suppress defendant's prior criminal convictions; and (5) Motion to Quash.

The record indicates that the trial court set a hearing date of June 6, 2006, to address the motions. In a June 6, 2006, hearing disposition, the court noted its intent to issue a written opinion. On September 14, 2006, the court issued an opinion and order denying the motions to quash and for severance. In a November 14, 2006, hearing disposition, the trial court indicated that it would issue a ruling on the motion to dismiss on November 28, 2008, which was the first day of trial. On that day, the trial court issued a detailed oral ruling, denying the motion to dismiss based on due process. With regard to the motion to suppress defendant's prior convictions, defendant concedes in his appellate brief that the motion "was granted."

With regard to the remaining motion concerning Cottleon's aliases and prior convictions, it is apparent that defendant's request was satisfied. Cottleon's aliases were disclosed at the preliminary examination and at trial. The prosecutor stated on the record at trial that Cottleon's aliases and prior convictions had been researched and provided to the defense attorneys. The court noted that the information was provided as a result of a discovery motion. We also note that on November 28, 2006, the first day of trial, the court indicated that it had ruled on all of defendant's motions, except the motion to dismiss. Defense counsel did not challenge the court's statement.

In sum, the record does not support defendant's claims that the trial court did not adjudicate his motions. As a result, defendant's related claims based on that false premise, i.e., that the trial court obstructed justice, exhibited bias, and impeded his ability to prove his innocence, are also unfounded.

### C. *Brady* Violation

Defendant argues that he was denied his right to due process because the prosecutor failed to provide discovery, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. "A criminal defendant has a due process right of access to certain information possessed by the prosecution." *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady*, *supra*. "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to

the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Lester*, *supra* at 281-282.

Here, defendant has not established a *Brady* violation. First, defendant does not indicate what evidence the prosecution withheld. A defendant must provide a factual basis to sustain his position, otherwise an issue may be deemed waived. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Second, the trial court stated at the preliminary examination that the prosecutor had confirmed that "everything that he has . . . has been turned over the defense attorneys." Third, defendant only claims that the prosecution withheld "inculpatory" evidence. Because defendant does not assert that evidence favorable to him was withheld, there is no basis for finding a *Brady* violation.

D. Transcripts

Defendant argues, in passing, that the record is inadequate for appellate review because he was denied the entire trial court record. Defendant does not identify what transcripts he was denied. Additionally, he has failed to explain how the absence of any transcript impeded his constitutional right to appeal. The defendant bears the burden of demonstrating "prejudice resulting from missing transcripts." *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986). "If the surviving record is sufficient to allow evaluation of defendant's claims on appeal, defendant's right is satisfied." *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983). We therefore reject this claim of error.

E. Sufficiency of the Evidence

Throughout his supplemental brief, defendant challenges the sufficiency of the evidence to sustain his convictions. As discussed, *supra*, the evidence was sufficient to support defendant's convictions.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello